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(Opinion following rehearing)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AARON PAUL ELWELL, Defendant and Appellant.	F072024 (Super. Ct. No. BF159154A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

S. Lynne Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Peña, Acting P.J., Smith, J. and Meehan, J.

Defendant Aaron Paul Elwell was charged with attempted second degree robbery (Pen. Code,[1] §§ 212.5, subd. (c), 664 [count 1]) and brandishing a deadly weapon, i.e., a box cutter (§ 417, subd. (a)(1) [count 2]). In connection with count 1, the information alleged he personally used a deadly weapon (§ 12022, subd. (b)(1)); was previously convicted of first degree burglary, a qualifying "strike" offense under the Three Strikes law (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and serious felony (§ 667, subd. (a)); and previously served a prison term (§ 667.5, subd. (b)).

Following a trial, the jury found defendant guilty as charged and found true the special allegation he used a deadly weapon. In a bifurcated proceeding, the trial court found true the remaining special allegations. Defendant was sentenced to six years, plus five years for the prior serious felony conviction and one year for using a deadly weapon, on count 1.[2] He also received a concurrent 90-day jail term on count 2.

On appeal, defendant contends the trial court erred by (1) instructing the jury on the elements of attempted robbery and attempted theft simultaneously; and (2) imposing a doubled base term of six years for the attempted second degree robbery conviction. In our original opinion, we concluded the aforementioned instruction was not erroneous and the court had the authority to impose a six-year doubled base term. We subsequently granted rehearing and ordered the parties to submit further briefing on whether *People v. Aledamat* (2018) 20 Cal.App.5th 1149 (*Aledamat*) compels reversal of defendant's brandishing conviction and the deadly weapon use enhancement. We conclude it does not. Accordingly, we affirm the judgment.

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1 Subsequent statutory citations refer to the Penal Code.

2 Because the prior serious felony and prior prison term allegations were based on the same offense, the court did not impose the enhancement for the prior prison term. (See *People v. Perez* (2011) 195 Cal.App.4th 801, 805.)

STATEMENT OF FACTS

On February 9, 2015, at 11:10 a.m., defendant entered a Rite Aid pharmacy. Michelle Leonard, an asset protection associate dressed in plain clothes, noticed he "immediately started looking around to see where the associates were." She observed defendant pocketing a pack of batteries from one aisle and a bicycle pump from another aisle. Less than a minute later, he exited the pharmacy. Leonard and Edgar Muralles, the store manager, followed defendant and instructed him to accompany them. Defendant initially refused to cooperate and asserted "he did not take anything." He "kept moving side to side and looking around" "like somebody weighing [his] options." Ultimately, defendant agreed to go back to the store.

Leonard and Muralles brought defendant to the stockroom. Leonard, who held a clipboard, told defendant to return the merchandise. He gave her the batteries but maintained they belonged to him. Leonard replied, "[N]o. They're mine. I'd seen you select them, and I'd seen you conceal them." Defendant pulled out a box cutter with "the blade out" and said, "[G]ive me my fucking batteries back." He "was very angry." Leonard "threw [her] hands up," took "two steps back," and remarked, "[W]hoa. It's not that serious." She was "[s]cared" because she "honestly thought [defendant] was going to try to cut [her]." Leonard "grabbed [her] phone and started taking pictures of him." Defendant put the box cutter away and asked, "[W]hy [are] [you] taking pictures of [me?]" Leonard answered, "[B]ecause if you cut me, then the police department is going to have your picture." She then scribbled "call BPD" on a piece of paper and showed it to Muralles. After waiting for "a couple of seconds," Muralles announced he "needed to go check in on a vendor" and left the stockroom to call 911. Meanwhile, Leonard conversed with defendant "to keep him calm." She asked him to return the bicycle pump and he complied. Leonard, however, was "still scared."

Approximately five to seven minutes after Muralles called 911, Officers Lewis and Barajas of the Bakersfield Police Department (BPD) arrived. In the stockroom,

Lewis searched defendant and found the box cutter in his pocket. During a subsequent interview with Barajas, defendant admitted he took the batteries and bicycle pump and expressed remorse. He also admitted he "presented a knife to [Leonard]" but insisted he "wasn't going to use it." Barajas also spoke with Leonard, who was "distraught" and "had some paleness to her skin." She told him "the blade to the box cutter" "was exposed" at the time of the incident.

At trial, defendant admitted he tried to steal the batteries and bicycle pump. In the stockroom, at Leonard's request, he emptied his pockets. Defendant handed her the batteries and bicycle pump with "an open palm." The box cutter, which "was closed all the way," was also "in an open palm." When Leonard "backed up" and said, "[W]hoa, whoa, whoa, you know, it's not that serious," defendant was baffled. He then "noticed [he] had a weapon in [his] hand" and deduced she "felt frightened or scared." Without prompting, defendant put the box cutter away. He only used the blade "to remove the stolen merchandise" and never pointed it at Leonard. Defendant denied saying, "[G]ive me my fucking batteries back."

DISCUSSION

I. The trial court's instruction on the elements of attempted robbery or theft was not erroneous.

a. *Background.*

Prior to closing arguments, the court instructed the jury:

> "[CALCRIM No. 460 (Attempt Other Than Attempted Murder):] The defendant is charged in Count 1 . . . with attempted robbery and a lesser included offense of attempted petty theft.
>
> "To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant took a direct but ineffective step toward committing robbery, and two, the defendant intended to commit robbery.
>
> "A direct step requires more than merely planning or preparing to commit robbery or obtaining or arranging for something needed to commit robbery. [¶] A direct step is one that goes beyond planning or preparation

and shows that a person is putting his or her plan into action. [¶] A direct step indicates a definite and unambiguous attempt to commit robbery. It is a direct movement towards the commission of the crime after preparations are made. [¶] It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt.

"A person who commits robbery is guilty of attempted robbery, even if[,] after taking a direct step towards committing the crime[,] he or she abandons further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. [¶] On the other hand, if a person freely, voluntarily abandons his or her plans before taking a direct step toward committing robbery, then that person is not guilty of attempted robbery.

"To decide whether the defendant committed robbery, please refer to the separate instructions that I will give you on that crime, which is CALCRIM [No.] 1600.

"[CALCRIM No. 1600 [(Robbery):] The defendant is charged in Count 1 with attempted robbery. CALCRIM [No.] 460 defines attempt, which I just gave you. This instruction defines robbery.

"To prove that the defendant is guilty of robbery, the People must prove that, one, the defendant took property that was not his own; two, the property was taken from another person's possession and immediate presence; three, the property was taken against the person's will; four, the defendant used force or fear to take the property or prevent the person from resisting; and five, when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or the enjoyment of the property.

"The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery.

"A person takes something when he or she gains possession of it and moves it some distance. The distance may be short.

"The property taken can be of any value, however slight. A person does not have to actually hold or touch something to possess it. It is

enough if that person has control over it or the right to control it, either personally or through another person.

"A store or business employee who is on duty has possession of the store or business owner's property.

"Fear as used here means fear of injury to the person himself or herself or immediate injury to someone else present during the incident or to that person's property.

"Property is within a person's immediate presence if it is sufficiently within his or her physical control that he or she could keep possession of it, if not prevented by force or fear.

"An act is done against a person's will if that person does not consent to the act. In order to consent, a person must act freely and voluntarily and know the nature of the act. [¶] . . . [¶]

"[CALCRIM No. 1800 (Theft by Larceny):] Defendant is charged in Count 1 with the lesser included offense of attempted petty theft by larceny, in violation of . . . [s]ection 484.

"To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant took possession of property owned by someone else; two, the defendant took the property without the owner['s] or owner's agent's consent; three, when the defendant took the property, he intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment [of the property]; and four, the defendant moved the property, even a small distance, and kept it for any period of time, however brief.

"An agent is someone to whom the owner has given complete or partial authority and control over the owner's property.

"For petty theft, the property can be of any value, no matter how slight."

After the prosecutor concluded his summation and the jury was excused for lunch, the court advised the parties:

"I need to re-read to the jury CALCRIM [No.] 460, which is attempt, because I only included partially robbery and petty theft in the attempt and

didn't explain to them an attempt goes to both the robbery and the lesser crime."

After defense counsel's summation and the prosecutor's rebuttal, the court informed the jury:

"Just a few follow[]up instructions, ladies and gentlemen. I am going to re-read you one instruction that I read this morning. [CALCRIM No.] 460. Don't feel that I'm giving it any more weight. It's just that I left something out of it. Okay?"

Thereafter, the court instructed:

"Defendant is charged in Count 1 with robbery and a lesser included offense of attempted petty theft.

"To prove that the defendant is guilty of these crimes, the People must prove that, one, the defendant took a direct but ineffective step toward committing robbery or theft, and two, the defendant intended to commit robbery or theft.

"A direct step requires more than merely planning or preparing to commit robbery or theft or obtaining or arranging for something needed to commit robbery or theft. [¶] A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into an action. [¶] A direct step indicates a definite and unambiguous attempt to commit robbery or theft. [¶] It is direct movement towards the commission of the crime after preparations are made. It's an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside of the plan had not interrupted the attempt.

"A person who attempts to commit robbery or theft is guilty of attempted robbery or theft, even if, after taking a direct step toward committing the crime, he or she abandons further efforts to complete the crime, or if his or her attempt failed or was interrupted by something or someone beyond his or her control. [¶] On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing robbery or theft, then that person is not guilty of attempted robbery or theft.

"To decide whether the defendant intended to commit robbery or theft, please refer to the separate instructions that I will give on the crime.

"So for robbery, [CALCRIM No.] 1600. For theft, [CALCRIM No.] 1800."

b. *Analysis.*

Defendant contends the court's modified CALCRIM No. 460 "repeatedly referred to the offenses of robbery and theft in the alternative" and improperly "informed th[e] jury that proof of the intent to commit theft and the direct but ineffective step in committing theft would suffice for an attempted robbery conviction." Because defense counsel did not object to the instruction below, the Attorney General asserts defendant forfeited his claim on appeal. However, section 1259 provides an appellate court may review "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Accord, *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.) " 'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim . . . .' [Citation.]" (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 554, fn. 11.)[3]

Upon review, we find no error. " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; accord, *People v. Anderson* (2015) 232 Cal.App.4th 1259, 1279.) Here, in advance of closing arguments, the court instructed the jury on attempted robbery (CALCRIM No. 460), robbery (CALCRIM No. 1600), and theft by larceny (CALCRIM No. 1800) but not the lesser included offense of attempted theft. (See *People v. Wilson* (1992) 3 Cal.4th 926, 941-942 ["A trial court must instruct on a lesser included offense when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of the lesser

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[3] As a result, we need not address defendant's alternative claim of ineffective assistance of counsel, which is premised on a finding of forfeiture.

offense."].) Following closing arguments and prior to deliberations, the court issued the modified CALCRIM No. 460, which specifies an attempted robbery or attempted theft requires (1) a specific intent to commit the particular crime; and (2) a direct but ineffectual step toward its commission. (Accord, § 21a.) The instruction ends: "To decide whether the defendant intended to commit robbery or theft, please refer to the separate instructions that I will give you on the crime," i.e., CALCRIM Nos. 1600 and 1800, respectively. While defendant alleges the modified CALCRIM No. 460 somehow permitted the jury to convict him of attempted robbery based solely on evidence of attempted theft, when "considered in context, it is clear there is no reasonable likelihood jurors understood [the instruction] as [defendant] asserts." (*People v. Lawrence*, *supra*, 177 Cal.App.4th at p. 557; see *People v. Henley* (1969) 269 Cal.App.2d 263, 271 ["We must . . . assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."].)

Even assuming, arguendo, there was instructional error, defendant's substantial rights were not affected. "The cases equate 'substantial rights' with reversible error, i.e., did the error result in a miscarriage of justice?" (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978, citing Cal. Const., art. VI, § 13 & *People v. Watson* (1956) 46 Cal.2d 818, 836.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, at p. 836; accord, *People v. Callahan* (1999) 74 Cal.App.4th 356, 363.)

As noted, "[w]here an attempt to commit a crime is charged, two important elements are essential to conviction: a specific intent to commit the crime, and a direct ineffectual act toward its commission." (*People v. Neal* (1950) 97 Cal.App.2d 668, 672.) " 'Specific intent as an element of a crime may be proved by showing circumstances surrounding the act from which it may be inferred by the court as a trier of facts. Direct

proof is not required but the circumstances must be such as would justify the court in inferring the intent with which the act was done. [Citation.]' [Citation.]" (*Ibid.*) In the instant case, defendant does not dispute he was guilty of attempted theft. " 'Robbery is essentially [theft] aggravated by use of force or fear to facilitate the taking of property from the person or presence of the possessor.' " (*People v. Smith* (2009) 177 Cal.App.4th 1478, 1489-1490.) Fear "may be either . . . [¶] . . . [t]he fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; [¶] or, [¶] . . . [t]he fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (§ 212.) The record demonstrates defendant stole batteries and a bicycle pump but was caught and brought to the stockroom. There, Leonard ordered him to return the merchandise. Defendant gave her the batteries but falsely claimed they belonged to him. When he was disproven, he became angry, pulled out a box cutter with the blade extended, and said, "[G]ive me my fucking batteries back." Leonard was scared and believed defendant would cut her. She raised her hands in the air, stepped back, and stated, "[W]hoa. It's not that serious." In addition, she alerted Muralles to call the police by scribbling "call BPD" on a piece of paper and showing it to him instead of verbalizing her request. Even after law enforcement arrived and subdued defendant, Leonard appeared "distraught" and pale. (See *People v. Anderson* (2011) 51 Cal.4th 989, 994 ["In California, '[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.' [Citation.] It thus is a robbery when the property was peacefully acquired, but force or fear was used to carry it away."].) We cannot find a reasonable probability the jury would have reached a verdict more favorable to defendant.

II. The trial court had the authority to impose a six-year doubled base term for the attempted second degree robbery conviction.

As noted, defendant's sentence on count 1 was comprised of a six-year doubled base term plus five years for the prior serious felony conviction and one year for using a deadly weapon, on count 1.

"Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years." (§ 213, subd. (a)(2).) "Notwithstanding [s]ection 664, attempted robbery in violation of paragraph (2) of subdivision (a) is punishable by imprisonment in the state prison." (§ 213, subd. (b).)

Defendant contends the proper sentencing triad for attempted second degree robbery is one, one and a half, or two and a half years. He cites section 664, which reads in pertinent part:

> "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:
>
> "(a) If the crime attempted is punishable by imprisonment in the state prison, . . . the person guilty of the attempt shall be punished by imprisonment in the state prison . . . for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. . . ."

According to defendant, when taking into account his prior strike conviction (see §§ 667, subd. (e), 1170.12, subd. (c)), the court could only impose a doubled base term of two, three, or five years. We disagree.[4]

"Section 664, subdivision (a), governs the sentencing of attempted felonies where the punishment is not otherwise specified by statute . . . ." (*People v. Epperson* (2017) 7 Cal.App.5th 385, 388.) "However, section 213, subdivision (b) specifically provides for the punishment of attempted second degree robbery, stating: '*Notwithstanding* [s]*ection*

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[4] Because we consider the merits of defendant's contention, we need not address his alternative claim of ineffective assistance of counsel, which is premised on a finding of forfeiture.

664, attempted robbery in violation of paragraph (2) of subdivision (a) [robbery of the second degree] is punishable by imprisonment in the state prison.' " (*People v. Moody* (2002) 96 Cal.App.4th 987, 990; cf. *People v. Epperson*, *supra*, at p. 388 [attempted first degree robbery governed by § 664, subd. (a), because § 213 does not specifically provide for punishment of attempted first degree robbery].)

"Although attempts to commit a felony punishable under the [determinate sentencing law] are normally punished by one-half of the term prescribed for a completed crime (§ 664, subd. (a)), the punishment for attempted second degree robbery is an exception to the rule. Section 213, subdivision (b), when combined with section 18, provides that attempted second degree robbery is punishable by 16 months, two years, or three years in state prison." (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.) Hence, in the instant case, taking into account defendant's prior strike conviction, the court was authorized to impose a doubled upper base term of six years.

III. Although the trial court's "deadly or dangerous weapon" instruction placed a legally invalid theory before the jury, reversal of defendant's brandishing conviction and the deadly weapon use enhancement is unwarranted.

a. *Background.*

Prior to closing arguments, the court instructed the jury:

> "[CALCRIM No. 3145 (Personally Used Deadly Weapon):] If you find the defendant guilty of the crimes charged in Count 1, you must then decide whether the People have proved the additional allegations the defendant personally used a deadly or dangerous weapon during the commission of that crime.
>
> "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that is capable of causing and likely to cause death or great bodily injury.
>
> "In deciding whether an object is a deadly weapon, consider all of the surrounding circumstances, including when and where the object was possessed, and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"Someone uses a deadly or dangerous weapon if he or she intentionally does any of the following: One, . . . [¶] [d]isplays the weapon in a menacing manner, or two, hits someone with the weapon.

"The People have the burden of proving each allegation beyond a reasonable doubt. [¶] If the People have not met this burden, you must find the allegation has not been proven. [¶] . . . [¶]

"[CALCRIM No. 983 (Brandishing Firearm or Deadly Weapon: Misdemeanor):] Defendant is charged in Count 2 with brandishing a deadly weapon . . . .

"To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant drew or exhibited a deadly weapon in the presence of someone else, and two, the defendant did so in a rude, angry, or threatening manner.

"A deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in a way that is capable of causing and likely to cause death or great bodily injury.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."

In his summation, the prosecutor argued:

"Now, a deadly or dangerous weapon is any object, instrument, or weapon that is either inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

"In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed.

"This – this is the thing. We all know things like a gun, you know, a 12-inch blade, those are deadly weapons. Pretty apparent.

"But there's some things that can be used both ways. A box cutter is a great example. This is a tool. It can be used for innocuous purposes.

"If, you know, while he's threatening someone he's . . . voluntarily cutting up some of their boxes for them, you know, that's not a deadly weapon. On that context this would not be a deadly weapon. It's being used the way it's supposed to. The same with say a pair of scissors.

"But when you hold this and it's – actually you even have a warning on this blade right here. I'll show it to you. [¶] Warning. Extremely sharp blade.

"I think anyone who has any experience with box cutters knows these are razor blades, incredibly sharp. . . . Holding something like this is now a deadly weapon. You can slice someone's throat open with this. You can take out their eyes. You can give them all sorts of lacerations that are going to require stitches.

"This is a deadly weapon when you're pointing it at someone in this manner. You know, some of the things that can be found as [a] deadly weapon, a pen, a pencil. It's an innocuous item, but even someone can be stabbed with this in the throat. . . . [¶] . . . [¶]

". . . You know, when someone is writing down something, it's not. But . . . when you use an item in such a manner that it could cause some sort of death or just great bodily injury, then it's a deadly weapon . . . ."

b. *Analysis.*

In *Aledamat*, the defendant was charged with assault with a deadly weapon, inter alia, after he thrusted the exposed blade of a box cutter toward the victim and threatened to kill him. It was further alleged defendant personally used a deadly or dangerous weapon in violation of section 12022, subdivision (b)(1). (*Aledamat*, *supra*, 20 Cal.App.5th at pp. 1151-1152.) Prior to deliberations, the judge instructed the jury a " 'deadly weapon' " was " 'any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing or likely to cause death or great bodily injury.' " (*Id.* at p. 1152.) In his summation, the prosecutor told the jury a box cutter constituted a deadly weapon because " '[i]f [it is] used in a way to cause harm, it would cause harm.' " (*Ibid.*) In rebuttal, he added a box cutter was "an 'inherently deadly weapon' because 'you wouldn't want your children playing with' it." (*Ibid.*) The

jury found the defendant guilty as charged and found true the deadly weapon allegation. (*Ibid.*)

On appeal, Division Two of the Second Appellate District reversed the assault conviction and the deadly weapon enhancement. (*Aledamat, supra*, 20 Cal.App.5th at pp. 1151, 1155.) Citing Supreme Court precedent, the court held "[a] box cutter is a type of knife, and 'a knife'—because it is designed to cut things and not people—'is not an inherently dangerous or deadly instrument as a matter of law.' " (*Id.* at p. 1153, quoting *People v. McCoy* (1944) 25 Cal.2d 177, 188.) Hence, the judge erroneously instructed the jury it could find the defendant's box cutter to be an inherently deadly weapon. (See *Aledamat, supra*, at p. 1153.) Furthermore, the court found the error prejudicial:

> "When an appellate court determines that a trial court has presented a jury with two theories supporting a conviction—one *legally* valid and one *legally* invalid—the conviction must be reversed 'absent a basis in the record to find that the verdict was actually based on valid ground.' [Citation.] That basis exists only when the jury has '*actually*' relied upon the valid theory [citations]; absent such proof, the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming [citation]. . . .
>
> "We conclude that the trial court's instruction defining a 'dangerous weapon' to include an 'inherently dangerous' object entails the presentation of a *legally* . . . invalid theory. . . . [A] box cutter cannot be an inherently deadly weapon 'as a matter of law.' [Citation.] This is functionally indistinguishable from the situation in which a jury is instructed that a particular felony can be a predicate for felony murder when, as a matter of law, it cannot be. Because this latter situation involves the presentation of a legally invalid theory [citation], so does this case.
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> "Further, we must vacate the assault conviction because there is no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a noninherently dangerous weapon was actually used). [Citation.] Indeed, the prosecutor in his rebuttal argument affirmatively urged the jury to rely on the legally invalid theory when he called the box cutter an 'inherently deadly weapon.' And because the trial court used the same definition of 'deadly weapon' for both the assault charge and the personal use

enhancement, both suffer from the same defect, and both must be vacated." (*Aledamat*, *supra*, 20 Cal.App.5th at pp. 1153-1154.)

Here, via CALCRIM Nos. 983 and 3145, the court instructed the jury a deadly or dangerous weapon is any object, instrument, or weapon that is *either* "inherently deadly or dangerous" *or* "used in such a way that it is capable of causing and likely to cause death or great bodily injury." Because it is undisputed defendant used a box cutter, and a box cutter is not an inherently deadly or dangerous weapon as a matter of law, the court placed a legally invalid theory ("inherently deadly or dangerous") as well as a legally valid one ("used in such a way that it is capable of causing and likely to cause death or great bodily injury") before the jury. The remaining question is whether there is a basis in the record for concluding the jury relied on the legally valid theory. We conclude there is. In *Aledamat*, the prosecutor "*affirmatively* urged the jury to rely on the legally invalid theory when he called the box cutter an 'inherently deadly weapon.' " (*Aledamat*, *supra*, 20 Cal.App.5th at p. 1154, italics added.) However, in the instant case, though the prosecutor in his summation recited the court's deadly weapon instruction verbatim, he emphasized a box cutter is "a tool" that "would not be a deadly weapon" if "[i]t's being used the way it's supposed to," i.e., "cutting up . . . boxes," in contrast to a "gun" and a "12-inch blade," which are "[p]retty apparent[ly]" "deadly weapons." In other words, the prosecutor pushed the jury to consider only the legally valid theory.

Notwithstanding the court's erroneous instruction, reversal of defendant's brandishing conviction and the deadly weapon use enhancement is unwarranted.

DISPOSITION

We affirm the judgment.